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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 258

COMMERCIAL CREDIT COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 36) has not been reported. The opinion of the Circuit Court of Appeals (R. 71) is reported in 17 F. (2d) 902.

JURISDICTION

The decree of the Circuit Court of Appeals was entered February 21, 1927. (R. 78.) Petition for a writ of certiorari was filed May 19, 1927, and granted October 10, 1927, under the provisions of Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

1. If a vehicle is seized while being used for the transportation of liquor in violation of the National Prohibition Act, does Section 26 of that Act, by reason of its mandatory provisions, furnish the exclusive method of forfeiture and disposition of the proceeds of the car, so as to preclude forfeiture proceedings under Section 3450 of the Revised Statutes for use of the car to evade internal-revenue taxes on the liquor? Are Section 26 and Section 3450 in direct conflict where transportation is disclosed?

2. If in such case the proceedings under Section 26 are not compulsory and exclusive, does the commencement of a prosecution for illegal transportation under Section 26 of the National Prohibition Act, dismissed before trial, amount to an election by the United States to proceed under Section 26 of the National Prohibition Act so as to bar forfeiture proceedings under Section 3450, R. S.?

3. Is a civil proceeding *in rem* under Section 3450 to forfeit a vehicle for use in tax evasion a "prosecution" within the meaning of Section 5 of the Willis-Campbell Act, which says that a conviction under the Prohibition Act shall bar a prosecution under other statutes on account of the same act? Does a conviction of the driver for possession entitle the United States to a forfeiture of the car under Section 26—although there is no convic-

tion for transportation—if it be made to appear that the possession and transportation were simultaneous, and thus make applicable the rule announced in *Port Gardner Investment Co.* v. *United States* that a conviction for illegal transportation under Section 26 bars forfeiture proceedings under Section 3450?

STATUTES INVOLVED

The principal statutes involved are set forth in an appendix to this brief.

STATEMENT

On November 23, 1925, the United States filed a libel of information in the United States District Court for the Western District of Washington against a Ford coupe and Leo Oppie (otherwise known as W. G. Campbell) and all other persons lawfully intervening, praying for the forfeiture of the car because it was used October 9, 1925, at the city of Seattle for removal, deposit, and concealment of intoxicating liquor with intent to defraud the United States of the internal-revenue tax thereon, which had not been paid. (R. 3.)

The Commercial Credit Company, petitioner herein, intervened. Its amended answer (R. 16) alleged that it was the owner of the legal title of the car, which had been sold and delivered to W. G. Campbell (informed against as Leo Oppie), under a conditional sales contract; that Campbell was

still indebted to the petitioner for part of the purchase price; that Campbell had defaulted in the performance of his contract, and his interest in the car had been thereby forfeited, and the petitioner was the sole owner; that Campbell had been convicted, under the name of Oppie, of violation of the National Prohibition Act, and the conviction involved the identical transaction forming the basis of the forfeiture proceedings. It alleged that it had no knowledge that the car was used or intended to be used in violation of law. A jury was waived and on March 29, 1926, the case was tried before District Judge Bourquin. The evidence (R. 24) disclosed that customs inspectors, having received reports that this car was being used by Campbell to handle a quantity of Canadian liquor and to distribute it about the city of Seattle, watched its movements for some days, and on the evening of October 9, 1925, observed the car parked in an alley back of Campbell's house. After some time Campbell came out of the house, got into the car, started its motor, and moved it to back out of the alley. Thereupon the customs inspectors stopped it and a search of it disclosed 10 quarts of whiskey and 3 quarts of gin. Campbell was arrested and the car seized. The liquor bore labels indicating that it was of foreign manufacture, and there were no stamps on the bottles showing payment of customs or internal revenue duty, and there was evidence

tending to show that no tax had been paid. The following stipulation was entered into (R. 31):

> It is further stipulated as a part of the claimant's case between the counsel for the Government and myself that the man driving this car, W. G. Campbell, was charged under the National Prohibition Law in cause number 10223 of the records of this court with unlawful possession and transportation of liquor and plead guilty to unlawful possession, whereupon the Government dismissed as to the transportation, and that covers the identical transaction here involved.

At the close of the evidence this petitioner moved to dismiss the libel on the grounds, among others, that the United States had failed to prove that the taxes on the liquor had not been paid and that the United States had elected to proceed under the National Prohibition Act against the driver and was barred from further prosecution for the same act, and that Section 3450 of the Revised Statutes had been repealed by the National Prohibition Act and the Willis-Campbell Act in so far as it related to cases of transportation or possession of intoxicating liquors. (R. 34.) The District Court denied the motion to dismiss and ordered the car forfeited and sold, and that the net proceeds of the sale be paid to the clerk of the court. The District Court made no findings, but filed a decision (R. 37–39) holding that there was sufficient evidence that the

internal-revenue tax was unpaid. On appeal (R. 78) the Circuit Court of Appeals for the Ninth Circuit affirmed the decree holding that there was no bar to forfeiture under Section 3450, because there had been no prosecution, with effect, of the charge of transportation, that charge having been dismissed, and that the conviction of the driver for possession, properly referred to Section 3 of the National Prohibition Act, did not entail a forfeiture of the automobile under Section 26.

SUMMARY OF ARGUMENT

Section 26 of the National Prohibition Act is not mandatory in the sense that proceedings under it are compulsory and therefore exclusive in the case of a car seized while used to illegally transport liquor. The contention that it is mandatory is based on its use of the word "shall." That should be construed to mean "may."

The consequences shown to result from treating Section 26 as mandatory and exclusive, as excluding forfeiture under Revenue and Customs Acts, where a vehicle used for illegal transportation is also used for evasion of taxes or smuggling, negative an intention on the part of Congress to make Section 26 exclusive.

There is no direct conflict between Section 26 and Section 3450. If Section 26 is construed to make forfeiture proceedings under it permissive, not mandatory, the argument that a conflict exists loses its force. A provision in one statute authorizing

forfeiture of guilty interests in a car used for illegal transportation is not in direct conflict with another statute providing that the whole value of the vehicle may be forfeited if its use is in violation of the Revenue or Customs Laws.

The institution of a prosecution for illegal transportation, afterwards dismissed, is not an election which bars subsequent forfeiture proceedings under Section 3450. Section 5 of the Willis-Campbell Act makes only conviction under one a bar to prosecution under the other and takes no account of a prosecution resulting in dismissal. No principle of law has been adduced to the effect that mere institution of a prosecution for an offense under one statute bars proceedings for a violation of another.

A conviction of the individual for illegal possession or any other offense, excepting illegal transportation, under the National Prohibition Act is no bar to a proceeding *in rem* for forfeiture of the vehicle for tax evasion under Section 3450. Such a proceeding is not a prosecution within the meaning of Section 5. There is no such offense as "possession in transportation." Where conviction for possession occurs, no forfeiture of a vehicle under Section 26 is entailed, and that section does not come into operation. The finding of the District Court that an internal-revenue tax was due and unpaid is not open to question here, because not raised in the application for certiorari.

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ARGUMENT

I

SECTION 26 OF THE NATIONAL PROHIBITION ACT IS NOT MANDATORY IN THE SENSE THAT PROCEEDINGS UNDER IT ARE COMPULSORY AND EXCLUSIVE IN THE CASE OF A CAR SEIZED WHILE ILLEGALLY TRANSPORTING LIQUOR

In *United States* v. *One Ford Coupe,* 272 U. S. 321, it was held, where transportation was not involved, that Section 3450 could be applied to forfeit a vehicle used as a place of concealment and deposit of intoxicating liquor for the purpose of evading an internal revenue tax. In *Port Gardner Investment Company* v. *United States,* 272 U. S. 564, it was held that where transportation was involved and there had been a conviction under the National Prohibition Act for illegal transportation, disposition of the car under Section 26 became mandatory, and resort to proceedings under Section 3450 was precluded. The questions left open by these decisions were, first, whether, if a vehicle is seized while in use for illegal transportation, the provisions of Section 26 are mandatory and compel proceedings thereunder and thereby prohibit proceedings under Section 3450, R. S.; second, if Section 26 is not by its terms mandatory and exclusive in cases of illegal transportation, is the Government required to elect which section it will proceed under, and does that election take place through the mere institution of a prosecution under Section 26, sub-

sequently dismissed; third, does a conviction of any offense under the National Prohibition Act, by reason of Section 5 of the Willis-Campbell Act, bar not only a prosecution of the individual, but civil proceedings *in rem* for forfeiture of the car under Section 3450, R. S., where the two offenses arise out of the same transaction?

1. The argument that where illegal transportation occurs the United States has no choice, but must proceed under Section 26, is grounded on the use of the word "shall" in that section, and it is contended that because of this language the United States has no election and the statute makes proceedings under it mandatory. Of course, if by reason of the language used, proceedings under Section 26 are held to be compulsory in transportation cases, and therefore exclusive, there is no election, because there is no choice.

The question is one of legislative intention, and the consequences which may flow from so construing Section 26 may throw light on the question whether Congress intended them by the use of the word "shall."

Construing Section 26 as mandatory and exclusive because of the use of the word "shall" produces the following consequences:

First. If a vehicle is used only to conceal liquor on which the tax is unpaid, complete forfeiture results; but if to the offense of evading taxes is added the offense of transportation without a permit, a less severe forfeiture results.

Second. If proceedings under Section 26 are compulsory, and therefore exclusive, where a vehicle is used for illegal transportation of liquor, the United States is not only precluded from forfeiting the car under Section 3450 for evasion of internal revenue taxes, but under any other statute imposing forfeiture for some other simultaneous offense. Sections 3061 and 3062 of the Revised Statutes (see Appendix, page 36) deal with forfeiture of vehicles used for smuggling, and, like Section 3450, do not save the interest of innocent incumbrancers. The argument based on the mandatory language of Section 26, carried to its logical conclusion, has the result that a vehicle used to smuggle intoxicating liquor and seized in the act of transporting the liquor across an international boundary may only be forfeited under Section 26, saving the interests of innocent lienors, although the offense of smuggling has simultaneously been committed entailing under Sections 3061 and 3062, R. S., complete forfeiture. Upon that theory a vehicle seized while in use for smuggling narcotics or diamonds may be completely forfeited, but if used for smuggling liquor the innocent interests are protected. Still more extreme results flow from this contention. If the vehicle carries both liquors and other merchandise, it is used in transporting liquor in violation of the National Prohibition Act, and in smuggling other merchandise, and yet Section 26 must be resorted to rather than Sections

3061 and 3062. The result would be that those engaged in using vehicles for smuggling any kind of merchandise should in all cases carry some quantity of intoxicating liquor which, in case of arrest, may be produced to bring Section 26 exclusively into operation and prevent the forfeiture of any but guilty interests. These illustrations are not overdrawn, and disclose results to flow from construing the word " shall " in Section 26 to make proceedings under that section compulsory and exclusive where illegal transportation of liquor occurs.

Third. If a person is discovered in the act of using a vehicle to illegally transport liquor, but escapes, no forfeiture of the car could result, because under Section 26 conviction of the individual must first be had, and if that section be exclusive, Section 3450 or Sections 3061 and 3062 may not be resorted to even though the car may have been used to conceal tax-unpaid liquor, or to smuggle. Again, if one is discovered in the act of using a vehicle to illegally transport, and witnesses die or fail to identify him prosecution would have to continue under Section 26, although futile, and no proceedings could be had under Section 3450.

Other illustrations might be given to show consequences which Congress could not have intended, but which flow from reading the word "shall" as used in Section 26 to require that forfeiture proceedings be had under Section 26, or not at all,

where illegal transportation occurs. It does not seem necessary to give that interpretation to the words used. With no other word in the English language have the courts taken greater liberties than with the word "shall." In *Railroad Company* v. *Hecht*, 95 U. S. 168, it was said that as against the Government the word "shall" is to be construed as "may," unless a contrary intention is manifested. In common parlance the word 'shall" has a compulsory meaning, but in law "shall" or "may" are often convertible terms. *West Wisconsin Ry. Co.* v. *Foley*, 94 U. S. 100, 103. In *Boyer* v. *Onion*, 108 Ill. App. 612, it was pointed out that the intention of the statute under consideration controls and that when the spirit and purpose of the Act require the word "shall" to be construed as giving permission it will be done. In *Fields* v. *United States*, 27 App. D. C., 433, 440, it is said:

> Words like may, must, shall, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed.
>
> *Nixon* v. *Grace*, 98 Ark. 405.

In *Fleischmann Co.* v. *United States*, 270 U. S. 349, it is said (p. 360):

> The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of

> Congress. * * * And unjust or absurd consequences are, if possible, to be avoided.

See also *Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *Kirby*, 7 Wall. 482, 486; *United States* v. *Katz*, 271 U. S. 354, 357.

Section 3450 provides that for use in evading taxes a vehicle "shall be forfeited." It uses the word "shall," but it has not been suggested that it is therefore mandatory and exclusive and prohibits resort to Section 26, or to Sections 3061 and 3062, if the facts justify it.

If Section 26 is mandatory and compels a prosecution for transportation where transportation occurs, that mandate was disregarded here, because the prosecution for transportation was dismissed in consideration of a plea of guilty to the charge of possession, which carried less severe penalties.

Section 26 should not be construed as compulsory and exclusive, but to leave it open to the United States to proceed under either of these statutes, if not under both, where distinct offenses under each are disclosed.

There is no direct conflict between Section 26 so construed and Section 3450. This subject was dealt with at length in *United States* v. *One Ford Coupe, supra,* and *Port Gardner Investment Company* v. *United States, supra.* The contention that a direct conflict existed within the meaning of Section 5 of the Willis-Campbell Act, which continued certain laws in effect "except such provisions of

such laws as are directly in conflict with any provision of the National Prohibition Act," was itself grounded largely on the mandatory language of Section 26 (concurring opinion, *United States* v. *One Ford Coupe,* p. 335). If Section 26 is not construed as compulsory and therefore exclusive, the argument for the existence of a conflict loses its force. One statute providing that the United States *may* forfeit guilty interests in a vehicle for its use in violation of the National Prohibition Act, and another statute that the United States may forfeit all interests in the vehicle if used to evade the revenue or customs laws are not in conflict. See *Distilled Spirits,* 11 Wall. 356, 365; *United States* v. *Turner,* 266 Fed. 248; *United States* v. *One Ford Automobile,* 292 Fed. 207, 210; *United States* v. *One Bay State Roadster,* 2 F. (2d) 616, 622; *United States* v. *One Ford Coupe,* 3 F. (2d) 64, 66.

II

THE INSTITUTION OF A PROSECUTION FOR ILLEGAL TRANSPORTATION UNDER SECTION 26, WHICH IS DISMISSED BEFORE TRIAL, IS NOT AN ELECTION BY THE UNITED STATES WHICH PRECLUDES FORFEITURE PROCEEDINGS UNDER SECTION 3450, R. S.

The ordinary doctrine of election of remedies as applied in civil cases where two inconsistent remedies exist for the enforcement of one right has no application here. Sections 26 and 3450 define and punish distinct and separate offenses with different penalties. There never has been a rule of criminal

law to the effect that where a transaction results in a violation of two statutes and in the commission of two separate offenses, the mere institution of prosecution under one amounts to a final election, and forever prevents prosecution under the other, and by the same reasoning, where forfeiture results under each, the mere institution of proceedings under one does not forever preclude proceedings to forfeit under the other. The test of identity of offenses is whether the same evidence is required to sustain them, and where two distinct offenses result from one transaction requiring different evidence to sustain them not only is the commencement of a prosecution of one not a bar to the prosecution of the other, but conviction under one does not bar prosecution under the other. *Carter* v. *McClaughry,* 183 U. S. 365, 394; *Albrecht* v. *United States,* 273 U. S. 1; *Morey* v. *Commonwealth,* 108 Mass. 433.

If the institution of a prosecution for illegal transportation under Section 26 is a bar to the subsequent institution of forfeiture proceedings under Section 3450, it must be by virtue of some special statutory provision applicable to this situation, and we have been unable to find one.

Section 5 of the Supplemental Act of November 23, 1921 (c. 134, 42 Stat. 222, 223; U. S. C., Title 27, Section 3), known as the Willis-Campbell Act, provides that all laws in relation to the manufacture of and traffic in intoxicating liquor and all penalties for violation of such laws that were in

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force before the National Prohibition Act, shall continue in force, except such provisions of such laws as are directly in conflict with the National Prohibition Act or the Supplemental Act. It then provides—

> if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

This statute makes only a conviction under one a bar to prosecution under the other. It takes no account of mere prosecutions resulting in dismissal or acquittal.

If the United States has a choice, in cases where vehicles are seized while being used for illegal transportation and also for tax evasion, between prosecuting for transportation and procuring forfeiture under Section 26, and asking forfeiture under Section 3450, no principle of law has been adduced to support the contention that the election becomes final when a prosecution for transportation under Section 26 is commenced.

In the *Port Gardner Investment Company case, supra,* it was held that where a prosecution for transportation under Section 26 reaches the point where a judgment of conviction of the individual is rendered, forfeiture under Section 26 inevitably follows, and it may be said, therefore, that a prosecution for illegal transportation with effect results in final election. We infer that the conclusion so

reached in that case has for its basis that under Section 26 the criminal prosecution and the forfeiture are in a single proceeding, the judgment of conviction itself amounting to a judgment of forfeiture on the terms provided in the Act, of which the further proceedings are only in execution, and that to thereafter seek forfeiture under Section 3450 would require a disregard of or a modification of a judgment already entered. *United States* v. *Torres,* 291 Fed. 138, 144.

In the argument of the case of *United States* v. *One Ford Coupe, supra,* and *Port Gardner Investment Company* v. *United States, supra,* the United States offered the suggestion that Section 26 should be construed to mean that, in so far only as a violation of the National Prohibition Act is involved, innocent interests shall be protected, but to leave it open to the United States to insist on the forfeiture of the entire proceeds for another offense under Section 3450 if the facts warrant it, and that at any time short of the actual distribution of the proceeds of the sale of the car the Government may interpose a libel under Section 3450 claiming forfeiture of that part of the proceeds which would have been exempt under Section 26 if only a violation of that section were involved, and that the practice disclosed in *United States* v. *385 Barrels of Wine,* 300 Fed. 565, might be resorted to. The Court seems to have rejected this theory in the *Port Gardner Investment Company case,* at least to the extent of holding that it is too late to apply it after judgment

of conviction of illegal transportation under Section 26 is entered.

A prosecuting officer should be given reasonable latitude. After instituting prosecution for illegal transportation under Section 26, he may find it advisable for various reasons to discontinue. There is no good reason to say that having once commenced such a prosecution he is irrevocably committed to it.

III

A CONVICTION OF AN INDIVIDUAL OF THE OFFENSE OF ILLEGAL POSSESSION UNDER THE NATIONAL PROHIBITION ACT IS NOT A BAR TO FORFEITURE FOR TAX EVASION UNDER SECTION 3450

In the *Ford Coupe case* there had been no conviction of any offense under the Prohibition Act.

In this case there was a conviction for unlawful possession but not for unlawful transportation, and the question arises whether the conviction for possession bars a forfeiture proceeding under Section 3450, R. S. Petitioner's contention is that, although the conviction was only for illegal possession, the testimony taken in this case—not in the criminal case because there was a plea of guilty and no testimony—shows that the possession was simultaneous with illegal transportation, and a conviction of possession under such conditions is equivalent to a conviction for illegal transportation under Section 26, giving the right to forfeit the car under Section 26, and that the case therefore is the same as if a judgment of conviction for illegal transportation had

been entered, making the *Port Gardner case* applicable. This contention hardly deserves consideration. While Section 26 does use the word "possession," this Court has already said, in *United States* v. *One Ford Coupe, supra,* page 334:

> While the second sentence in § 26 uses the words "transported or possessed," the context makes it very plain that the possession intended is possession in transportation. Hence that section is applicable only if a person is discovered in the act of transporting intoxicating liquor in violation of law.

The court below said there is no such offense as "possession in transportation" (R. 75), and that the conviction for possession must be considered to have been based on Section 3, which does not entail forfeiture of vehicles.

The only conviction which under Section 26 is to be followed by forfeiture of the vehicle is conviction for illegal transportation. The offense of possession alone is covered by other sections of the National Prohibition Act. A third offense, "possession in transportation," was not intended to be defined by Section 26. In any case the only conviction here was for possession. The judgment roll in that case is not here, and we do not know whether it discloses only "possession in transportation." Certainly after a judgment of conviction for illegal possession is entered, it is not open to the United States to have a trial and take evidence on the question whether the possession was simul-

taneous with transportation, for the purpose of procuring a forfeiture under Section 26. If the conviction for possession did not entail forfeiture of the car, then the *Port Gardner case* is not applicable. Furthermore, if anything *dehors* the record in the criminal case may be considered, the evidence in the present case does not exclude the possibility that there may have been possession prior to transportation followed by possession simultaneous with transportation.

The real question on this phase of the case was mentioned in the opinion in the *Port Gardner Investment Company case, supra,* at page 566.

Section 5 of the Willis-Campbell Act provides—

> if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

There has been in this case a conviction under the National Prohibition Act of the offense of illegal possession, and the questions arise whether the stipulation in this case that the conviction of Campbell "covers the identical transaction here involved" means that a prosecution under Section 3450 would be for the same "act or offense" as was the subject of the conviction so as to bar a prosecution under the statutes relating to evasion of taxes, and also whether the word "prosecution" in the Willis-Campbell Act refers to a civil proceeding *in rem* for a forfeiture of a vehicle, or only to

criminal prosecution of the individual. A conviction of the individual under Section 3450 is a bar to the prosecution of the individual for the same act under the National Prohibition Act, and as conviction of the individual under the National Prohibition Act is, by terms of Section 26, a condition precedent to forfeiture under Section 26, it follows that a conviction of the individual under Section 3450 would prevent a summary court forfeiture provided for by Section 26, but the converse is not true. A conviction of the individual for illegal transportation under the National Prohibition Act may bar a prosecution of the individual for the same act under Section 3450, but conviction of the individual under Section 3450 is not a condition precedent to the forfeiture of the vehicle under that section. Consequently, the conviction of the individual under the National Prohibition Act for any offense except transportation under Section 26 does not bar proceedings *in rem* under Section 3450, unless the word "prosecution" in Section 5 includes a civil proceeding to forfeit a vehicle.

The ordinary meaning of the words used limits the operation of the section to criminal prosecutions and convictions of the individual. If Congress intended that conviction of the individual under one statute should bar civil proceedings *in rem* for forfeiture of inanimate objects under another, it would have used appropriate words. It would be an unwarranted enlargement of the ordi-

nary meaning of words to apply this provision of Section 5 to anything but criminal prosecutions and convictions of persons. *United States* v. *385 Barrels of Wine*, 300 Fed. 565.

The purpose of Section 5 was to prevent double punishment of the individual and two fines or sentences of imprisonment inflicted on one individual for a single act. An individual may be given two sentences and that is what Section 5 sought to prevent, but a vehicle may not be twice forfeited. Besides, as is the case here, the car may not belong to the individual convicted, and if not, its forfeiture adds nothing to his punishment.

IV

THE QUESTION WHETHER THE FINDING THAT THE TAX WAS UNPAID IS SUSTAINED BY THE EVIDENCE IS NOT OPEN HERE

Under paragraph II of its brief petitioner devotes space to the point that the facts of this case do not justify forfeiture under Section 3450, because the evidence was insufficient to show that an internal-revenue tax was due and had not been paid. This question is not before the Court. It was not suggested in the petition for certiorari nor in the supporting brief. It was not one of the grounds urged for the issuing of the writ, and certainly this Court did not issue the writ for the purpose of examining a question of fact peculiar to this case and bearing only on the title to a single automobile. It

is settled that the errors complained of must be assigned in the petition for certiorari or supporting brief, and this Court has recently dismissed writs of certiorari where it appeared that the decision of the cause required consideration of questions not raised in the petition and on which the writ issued.

The findings were supported by some evidence. The liquor was seized at a port near the Canadian line, it bore foreign brands and labels, and it was uncertain whether it had been smuggled into the United States or whether it was "domestic in masquerade." (R. 39.) In either event it was subject to an internal-revenue tax. If produced in the United States, legally or illegally, it was subject to the basic tax. *United States* v. *One Ford Coupe, supra.* If imported, it was likewise subject to the internal-revenue tax. The Revenue Acts impose the basic tax of $2.20 a gallon on spirits "produced in or imported into the United States." This tax is expressly stated to be in addition to any customs duty imposed by the Tariff Act of 1922. It is also provided that—

> Distilled spirits smuggled or brought into the United States unlawfully shall, for the purposes of this subdivision, be held to be imported into the United States,

so that even if illegally introduced into the United States, they are subject to the basic tax of $2.20 imposed by the internal revenue Acts. (See Section 600 of the Revenue Act of 1918 as amended by

Section 900 of the Revenue Act of 1926. Act of February 26, 1926, c. 27, Sec. 900, 44 Stat. 9, 104; U. S. C., App., Title 26, Sec. 245.)

In this connection it is interesting to note that Congress has by express provision said that foreign liquors smuggled into the United States, as well as those lawfully imported, shall be subject to the internal-revenue tax, thus furnishing added support to the conclusion reached in *United States* v. *One Ford Coupe, supra,* that Congress intended to impose the basic tax on domestic liquor illicitly manufactured, since there would be no reason to distinguish in this respect between liquor illegally introduced and that illegally produced.

The Tariff Act of 1922, Title I, Schedule 8, imposes a duty on imported wine and spirits. Whether the liquor in this case was domestic or foreign, it was subject to the internal revenue tax.

The provisions of the Tariff Act and of the Revenue Acts above referred to support the suggestion made on page 10 of this brief that a vehicle used to smuggle liquor into the United States is subject to forfeiture under Section 3062, because used to evade a duty, and is likewise subject to forfeiture under Section 3450 because used to evade the internal revenue tax due upon importation, although the guilty interests are subject to forfeiture under Section 26 for illegal transportation.

V

GENERAL CONSIDERATIONS

The remainder of the petitioner's brief is devoted to an argument to establish the injustice of forfeiting innocent interests in a vehicle used for law breaking by one to whom the owner has entrusted it. This is an argument which is more properly addressed to Congress. Section 3450, providing for forfeiture of vehicles for tax evasion, and Sections 3061 and 3062, R. S., providing for forfeiture for smuggling, without saving innocent interests, have been in effect for many years. The argument of the petitioner, if sound in its attack on these statutes, would have been equally effective against them before the National Prohibition Act was passed. It is too clear for argument that by the Willis-Campbell Act Congress intended to restore, if they had been impliedly repealed, Section 3450, R. S., and Sections 3061 and 3062, R. S., as applied to cases where a vehicle is used for smuggling intoxicating liquors or evasion of the taxes or duties on them. The complaint against the fairness of those statutes is now made because, as the result of unlawful traffic in liquors, forfeitures of vehicles are becoming more frequent. No doubt the business of the petitioner is, as it claims, an important link between the automobile manufacturer and the banks in connection with sale of cars on the installment plan. There is equal ground for saying that it is an important ele-

ment in the business of those violating the laws affecting traffic in and taxes and duties on liquors, in enabling them to reduce their losses through forfeitures upon arrest, by using cars held under conditional-sales contracts or subject to mortgages, and where seizure results in forfeiture of only a part of the value of the vehicle. See *United States* v. *One Saxon*, 257 Fed. 251, 253. To sustain petitioner's contention places an obstacle in the way of law enforcement. Petitioner contends that in any case of illegal transportation under the National Prohibition Act without a conviction therefor, or in case there is a conviction for any other offense under that Act, proceedings under Section 26 saving the rights of innocent incumbrancers may alone be resorted to or there is no forfeiture at all, notwithstanding other offenses under Revenue and Customs laws occur. Having established that, the next step, no doubt, will be to attempt to defeat any forfeiture whatever under Section 26 of cars held under conditional sales contracts on the ground that the guilty have no interest left in the vehicle. In this case the record shows that the conditional sales contract contained a clause to the effect that if the vehicle was used for the transportation of intoxicating liquor the interest of the purchaser should be forfeited to the vendor, and this was relied on to show that the petitioner was sole owner. (R. 32.) If Section 26 is held exclusive, compulsory, and mandatory, we expect next to be confronted with the

argument that the entire ownership of the car was innocent and nonforfeitable because the very act which the Government asserts as the ground for forfeiture operated to terminate the interest of the guilty vendee.

Respectfully submitted.

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NOVEMBER, 1927.

APPENDIX

For the convenience of the Court the following statutes are set forth below:

Section 26, Title II, of the National Prohibition Act of October 28, 1919, ch. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be con-

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ditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant

shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds, after deducting the expenses and costs, shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 35, p. 317 (U. S. C., Title 27, Sec. 52):

All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compro-

mise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

Section 5 of the Supplemental Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3):

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. * * *

Section 3450 of the Revised Statutes (U. S. C., Title 26, Sec. 1181):

> Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all

such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commis-

sioner of Internal Revenue as the Secretary of the Treasury may direct.

Sections 3061 and 3062 of the Revised Statutes (U. S. C. Title 19, Secs. 482, 483):

SEC. 3061. Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

SEC. 3062. Every such vehicle and beast, or either, together with teams or other motive-power used in conveying, drawing, or propelling such vehicle or merchandise, and

all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other appurtenances of such beast, team, or vehicle, shall be subject to seizure and forfeiture. If any person who may be driving or conducting, or in charge of any such carriage or vehicle or beast, or any person traveling, shall willfully refuse to stop and allow search and examination to be made as herein provided, when required so to do by any authorized person, he shall be punishable by a fine of not more than one thousand dollars, nor less than fifty dollars.

Revenue Act of 1926, c. 27, Sec. 900, 44 Stat. 9, 104; U. S. C., App., Title 26, Sec. 245:

SEC. 900. Subdivision (a) of section 600 of the Revenue Act of 1918, as amended, is amended to read as follows:

"SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

"(1) Until January 1, 1927, $2.20 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon;

"(2) On and after January 1, 1927, and until January 1, 1928, $1.65 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon; and

"(3) On and after January 1, 1928, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

"(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

"(5) The internal revenue tax imposed by this subdivision upon distilled spirits heretofore or hereafter imported into the United States shall, under regulations prescribed by the Commissioner, with the approval of the Secretary, be collected and deposited in the same manner as other internal revenue taxes, except that such collection

and depositing shall be by the collector of customs instead of by the collector of internal revenue. Such tax shall be in addition to any customs duty imposed under the Tariff Act of 1922 or any subsequent Act.

"(6) Distilled spirits smuggled or brought into the United States unlawfully shall, for the purpose of this subdivision, be held to be imported into the United States, and section 3334 of the Revised Statutes, as amended, shall be applicable to any sale thereof."

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Schedule 8, paragraphs 801, 802, 803, and 813, of the Tariff Act of 1922, c. 356, 42 Stat. 858, 897, 898; U. S. C., Title 19, Sec. 121:

PAR. 801. Nothing in this schedule shall be construed as in any manner limiting or restricting the provisions of Title II or III of the National Prohibition Act, as amended.

The duties prescribed in Schedule 8 and imposed by Title I shall be in addition to the internal-revenue taxes imposed under existing law, or any subsequent Act.

PAR. 802. Brandy and other spirits manufactured or distilled from grain or other materials, cordials, liquors, arrack, absinthe, kirschwasser, ratafia, and bitters of all kinds (except Angostura bitters) containing spirits, and compounds and preparations of which distilled spirits are the component material of chief value and not specially provided for, $5 per proof gallon; Angostura bitters, $2.60 per proof gallon.

PAR. 803. Champagne and all other sparkling wines, $6 per gallon.

PAR. 813. No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.

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